

**BEFORE THE
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, D.C.**

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Comments of the	:	
	:	FAA-2001-9852
AIR CARRIER ASSOCIATION OF AMERICA	:	FAA-2001-9854
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Notice of Alternative Policy Options for Managing	:	
Capacity Airport and Proposed Extension of the	:	
Lottery Allocation	:	
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COMMENTS OF THE AIR CARRIER ASSOCIATION OF AMERICA

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COMMENTS OF THE AIR CARRIER ASSOCIATION OF AMERICA

The Air Carrier Association of America (“ACAA”) supports actions needed to address congestion and delays but urges the Federal Aviation Administration and the Department of Transportation to only take those steps needed to address immediate and significant congestion problems and that any actions taken to control operations at LaGuardia and at any other airport be consistent with the mandates set forth in the Airline Deregulation Act and the DOT Act to promote competition, new entry, low fares, and service to small communities.

The airline industry is at a critical point. There are fewer carriers and higher levels of concentration than at any time since deregulation. Consolidation is continuing and there are no applicants seeking authority. At the same time, important airports in this country are either completely or effectively closed to new entrants. While incumbents control 95% of the slots and gates at LaGuardia, new entrants cannot enter the airport and

those that have been able to obtain slots are limited to 10 roundtrips per day, must utilize gates and other facilities controlled by large carriers (sometimes their primary competitors) and are unable to obtain facilities that would enable them to leave a plane at the airport overnight allowing for an early morning departure. At the same time, the dominant carriers have the ability to operate any time of the day and add frequencies whenever they choose in any market. This is not true competition nor is it an “open” market.

While other airports have limitations that block new entry and real competition, the limitations in place at LaGuardia (and at National Airport where there is almost no new entry) are created by the Federal Aviation Administration through the high density regulations. For thirty-three years, the high density regulations have created the most significant barrier to entry and limitation on competition that exists at any airport in the United States and in the world.

Unfortunately, the actions taken last year by the FAA at LaGuardia and those now proposed by the agency’s “Notice of Alternative Policy Options for Managing Capacity at LaGuardia Airport and Proposed Extension of the Lottery Allocation”:

- limit competition;
- increase unreasonable industry concentration and market domination;
- discourage entry into markets by new entrants; and
- increase the price of air transportation.

ACAA believes that all carriers should be able to compete without restrictions.

ACAA supports “Open Skies” in the United States, however, no such “Open Skies” agreement yet exists. If restrictions remain in place at LaGuardia, new entrants have to be provided with opportunities to fairly compete on a level playing field.

The Department and the Federal Aviation Administration can meet all statutory mandates by taking some basic steps to preserve the future of competition. Those steps would have a minimal impact on the very carriers that control the high density airport slots (not to mention domestic and international markets), would have no impact on the markets they serve, and would promote competition for communities and air travelers from throughout the country. Such steps would bring those communities and travelers an option they have never previously enjoyed—low fare air service.

Need to Address Competition

Phase One

Under Phase One, the agency proposes to make 14 LaGuardia slot exemptions available through a lottery. ACAA agrees that carriers eligible to participate in the lottery should be new entrants that did not participate in the first lottery and new entrants that did not select four exemption slots in the first round of the December 4 lottery. It is only after new entrants have selected all the slots they are eligible to select that slots should be allocated to incumbent carriers to serve small communities. It is contrary to all available facts to suggest that new entrants were provided with a “slot” priority over small communities. New entrants are not the reason why small communities are not obtaining LaGuardia service. The incumbents can add service immediately to small communities if they wish to do so. They don’t. They would rather operate regional jets to Raleigh-Durham, Cleveland, Baltimore, Dulles, Chicago and Boston than add service

to small underserved communities.¹ Moreover, small communities will benefit as new entrants increase service at high density airports.

ACAA believes that the following changes should be made to the proposed lottery process:

1. Each new entrant should be able to select up to six slots in the first round. The dominant carriers in this country have all admitted that they would unlikely enter a market without at least three roundtrips. Yet, the FAA is asking small carriers with limited resources to compete with two roundtrips against carriers with multiple flights and unlimited resources. A difficult if not impossible task. Some carriers may elect only to operate one or two roundtrips, however, each should have the opportunity to have at least three. ACAA also believes that the agency needs to amend the definition of a new entrant from a carrier with 20 slots to a carrier with 30 slots.
2. New entrants should be able to select one slot exemption in each 30-minute period without regard to whether a slot is available in that time period. If the agency believes that some hours are too congested, the large carriers should be told to move slots to other time periods. Why should a new entrant be told that it can only have one slot in an hour when a competitor might have ten?
3. The slot exemptions that were allocated to Legend Airlines should be included in the new entrant lottery. The carriers that obtained those slots were not advised that they would be able to utilize those slots indefinitely. In the agency's notice, it states that "the FAA determined that the withdrawal of these exemption slots would further disrupt carrier schedules." The agency appears to utilize this excuse any time a suggestion is made that those controlling 95% of the airport should give up one or two slots each. Apparently, when a proposal is made to provide U.S. carriers with slots and gate facilities at foreign airports, it is a suggestion to promote open skies. When a similar but smaller request is made at a high density airport, it is deemed a disruption. When a carrier holds the number of slots controlled by the six dominant carriers at LGA, it can continue to operate in all of its markets if it is given 90-120 days notice that it will lose one or two slots. Moreover, these dominant carriers seem to have unlimited slots available to them. For example, when Legend Airlines initiated its service between Love Field and LaGuardia, American was immediately able to find slots to match Legend's service.
4. It is not realistic for the agency to expect new entrants, particularly those not currently operating at the airport, to commence operations with lottery slots by

¹ American recently added LaGuardia service to Raleigh-Durham (a market with multi carrier service) with regional jets. Other carriers have taken similar actions. At BWI, all service to LaGuardia is on regional jets.

October 29, 2001. First, the Port Authority imposes major obligations on carriers proposing to operate at LGA. Second, facilities are not readily available to new entrants or small carriers at LGA. Third, the new entrant has to make similar arrangements at the airport it is serving from LGA. Fourth, carriers with smaller fleets need to adjust schedules and add personnel to initiate operations at LGA. It is easier for a carrier to add a 17th roundtrip in a market than to initiate new service. For all of these reasons, new entrant carriers obtaining slots at the FAA slot lottery should be able to initiate service with those slots within 180 days after the lottery.

The FAA can take a number of steps to increase service by new entrants and to enhance small community service. If the objective is to promote competition, service, and growth in small markets, the agency should take the following additional modest steps.

1. FAA should suspend the extra section authority.² Extra sections were authorized when one shuttle operator operated between DCA-LGA-BOS. The section was added to allow extra sections when flights were full and there was no alternative for travel between the cities [Federal Aviation Administration, *46 FR 58036*, (Docket No. 21955; Amdt. Nos. 93-44 and 159-27), November 7, 1981]

Today, there are multiple carriers operating shuttle flights in the same markets. There are 177 shuttle flights from the Washington area to the New York area and 87 shuttle flights from the New York area to Boston. Many of these are now operated by regional jets. Now that Delta is converting its DCA-BOS shuttle to regional jets, why should it be allowed to add additional regional jet operations at those airports at will when new entrant carriers can not enter either airport? Why should the agency effectively reward these carriers for using aircraft with fewer seats, by allowing them to operate extra flights? Considering the number of flights available between all Boston, New York, and Washington area airports, these carriers should not be allowed to add to the total number of flights in these markets while new entrants are blocked from entering and growing at the airport and many small communities are still seeking additional service. By taking this

² To define an extra section, the Department stated:

§ 93.123 (b) (4) As under the previous policy, § 93.123 (b) (4) provides that extra sections of a scheduled operation will not be required to obtain a slot reservation. An extra section is an operation which: (a) Is nonscheduled; (b) serves the passengers who cannot be accommodated on the original scheduled section for which the carrier has obtained an arrival or departure reservation; and (c) the original section should depart no more than a few minutes before, on, or after the time at which it was scheduled.

step, the agency could provide additional slots to new entrants and small communities.

2. The agency should suspend the buy-sell rule. If agency officials are nervous about disruptions in service, why would they sit back and allow slot holders to abandon markets and decide which new markets will receive service. Carriers are not leasing slots to add service in small markets and they refuse to provide slots to new entrants. They are obtaining additional slots to add frequencies in their dominant hubs or to challenge competitors. The Department and GAO have acknowledged that new entrants cannot purchase slots. If slots are not sold or leased, they will be returned to the agency for allocations to new entrants and for service to small communities.

In addition to making the above changes to support competition, the agency needs to secure a commitment from the Port Authority that it will take all steps necessary to ensure that new entrants have reasonable and equivalent access to gates and facilities at LaGuardia and that the Port will expeditiously process all new entrants seeking to serve LaGuardia. It is not enough for the agency to provide slots. Slots without proper facilities are of limited value.

Competition Doesn't Exist at LaGuardia

While taking the steps recommended for Phase I will allow some additional new entry, LaGuardia will remain a high fare market that continues to be dominated by a few carriers.

In any discussion of LaGuardia capacity, it is essential that total information be disclosed concerning control of slots and operations at the airport:

- ninety-five percent of the slots are controlled by six carriers and their partners and affiliates;
- those carriers have controlled those slots for 16 years and have been able to sell, lease, trade, or loan those slots to competitors while keeping the slots away from potential competitors. This all occurs with no oversight by the federal government;

- no new entrant may have more than 20 slots (to serve all of the new entrants' markets) while large carriers utilize more than 20 slots in single markets including:

LGA-DCA shuttle markets (2 carriers)

LGA-BOS shuttle markets (2 carriers)

LGA-ATL

LGA-ORD (2 carriers)

DFW-LGA

MSP-LGA

DET-LGA

IAD- LGA shuttle markets (2 carriers)

BWI-LGA shuttle markets (2 carriers)

- 60 slots are utilized for Canada service.

The agency needs to take additional steps to address competition. Those steps cannot wait until the agency completes its implementation of a longer-term solution. Therefore, the ACAA asks that the agency:

1. Immediately conclude Phase One, and
2. Immediately implement a "fast-track" second Phase One process to address competition at LGA while the agency is searching for long-term solutions,³ and
3. Initiate Phase Two.

Phase One "Fast Track"

ACAA urges the agency to initiate an second immediate step, a Phase One "fast track", to address competitive issues while it considers a more permanent solution in Phase Two. History demonstrates that finding a method to handle the congestion

³ It is unlikely that those long-term solutions will ever allow open entry at LaGuardia.

problems at high density airports is lengthy and complex. It is extremely unlikely that Phase Two will be completed by October of next year.⁴

The FAA and the Department have for the past 33 years tried different approaches to eliminate the congestion and delays that created the need for the high density regulations and to create an alternative allocation methodology. In 1968, the Acting Administrator of the Federal Aviation Administration emphasized the need to take steps to address congestion and delays until steps were completed to expand system capacity⁵:

Delays of varying magnitude are encountered at many terminal areas . . . Congestion at these terminals frequently requires the imposition of traffic flow restrictions creating backup delays throughout the air transportation system.

A reduction in air traffic delays can be accomplished only by increasing the capacity of the system or decreasing the demands placed upon it. Certain changes in air traffic and airport procedures and practices are already planned by the FAA to increase aircraft handling capacity.

On November 9, 1969, in establishing the high density rule, the FAA stated, "the rule should be considered to be only a temporary solution." Unfortunately, 32 years later the high density rule remains in place at Ronald Reagan Washington National Airport and LaGuardia Airport. It is only because of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21") that there has been any new entry at both of those airports although there is less competition at those airports than when the "temporary solution" was first proposed in 1968.

It is with this background that there is great concern over any new "temporary solutions" proposed to address airspace and airport congestion. Those type of solutions

⁴ On June 20, 2001 the Air Transport Association filed for a 180 day extension of the Phase Two comment period. ATA raises legitimate concerns that further demonstrate the complexity of the issues. However, the FAA cannot--under any circumstances--extend the duration of Phase Two without immediately first addressing the competitive issues by providing additional slots to new entrants and small communities.

may again become permanent restrictions that will further block competition and service. Moreover, it is unlikely that the agency will find a magic formula that will manage delays and increase and allocate capacity. While ACAA recognizes that these are complex and difficult issues to resolve, the FAA cannot delay addressing competition and new entry while deliberating Phase Two options. Competition must not again be put on a shelf until October 2002, at the earliest.

Each time that the Department tried to address the causes of delays, it made clear that it was essential for competition to be protected.

As we stated in the show-cause order, we do not wish to impose capacity limits on carriers, and we do not intend that the discussions lead to a significant reduction in competition or in the carriers' ability to respond to market forces. As a result, we reaffirm our intent that any schedule agreements established at the discussions be voluntary, and no carrier will be bound by any agreement unless it chooses to agree. [Docket 42410, "Application For Discussion Authority And Prior Board Approval Of Carrier Agreements To Integrate Schedules," Order 84-8-129, "Order Granting Discussion Authority," August 31, 1984]

Since the agreements will be voluntary, carriers like America West who wish to enter one of the airports covered by an agreement will not be barred except to the extent that they choose to agree to limit their future operations. [Docket 42410, "Application For Discussion Authority And Prior Board Approval Of Carrier Agreements To Integrate Schedules," Order 84-8-129, "Order Granting Discussion Authority," August 31, 1984]

As the agency once again attempts to address increased congestion and delays, competition, new entry, the growth of small carriers and service to small communities must remain an equal priority.

Therefore, ACAA urges the agency to implement a "fast track" Phase One, in which it will conduct a comprehensive review of all slot regulations that impact competition, including the buy-sell rule, extra sections, and slot reallocation. It is time

⁵ Notice of Proposed Rule Making and Notice of Public Hearing; 33 FR 12580, September 5, 1968

for the agency to stop closing its eyes to the regulations that have created second class communities, carriers and travelers.

At Secretary Mineta's confirmation hearing, he stated:

[W]e need to remember that these benefits rely on actual competition in the marketplace...

* * * * *

[G]overnment needs to be the watchdog of competition, not to determine any particular outcome, but to assure that competitive conditions continue to exist.

It is inconsistent with the Secretary's comments and with the Department of Transportation Act for the agency to maintain the status quo while it hopes to conclude Phase Two.

Department Actions to Promote Competition

Recognizing the importance of competition and new entry, the Department has in the past taken steps to provide for new entry at high-density airports. In 1980, Secretary of Transportation Goldschmidt decided that new entry was so crucial to deregulation efforts that the Department issued Special Federal Aviation Regulation 43 ("SFAR 43"). SFAR 43 allocated 18 slots to new entrant New York Air at National, enabling New York Air to enter the Shuttle market. [45 FR 72637, Nov. 3, 1980]. The promotion of new entry was deemed so important that the slots provided to New York Air were withdrawn from all carriers.

The preamble to SFAR 43 made it clear that a **primary objective** of the Secretary of Transportation was to promote competition, even in routes that were already served. The preamble stated:

...additional low fare service in the market will increase competition and would thus be consistent with the Airline Deregulation Act.

The preamble also made it clear that the Department had a significant amount of authority to withdraw and allocate slots and that slots were not property belonging to the carriers.

The Department issued the buy-sell slot rules in December, 1985 (Amendment 93-49, 50 FR 52195). Although the buy-sell rules were designed to promote new entry, it hasn't worked! Under these rules, carriers were grandfathered existing slot holdings and allowed to buy or lease additional slots. In order to provide for new entry and some competition, the rules provided slots to new entrants. Since that time, however, the large carriers have gradually re-acquired all of the slots intended for new entrants and no further regulatory action has been taken to provide access to new entrants. According to numerous General Accounting Office ("GAO") studies, new entrants cannot purchase slots:

In 1986, we expressed concern that allowing airlines to buy and sell slots would reduce competition. By the early 1990s, we found that a few carriers had increased their control of slots to such an extent that they could limit access to routes beginning or ending at any of the slot-controlled-airports—airports that are crucial to establishing new service in the heavily traveled eastern and midwestern markets.⁶

Both GAO and the Department have acknowledged that the rule blocks competition at high density airports.

The Department's most recent step to promote competition was when it granted JetBlue 75 slot exemptions at JFK (Order 99-9-11). In that Order the Department stated:

⁶ Airline Deregulation: Barriers to Entry Continue to Limit Competition in Several Key Domestic Markets (GAO/RCED-97-4, Oct. 1996).

We made clear our support for increased competition and our willingness to invoke available tools to promote competition when we stated in our January 6, 1997, response to the GAO Report that ‘the Department intends to be more receptive to considering competition as a factor in granting slot exemptions to new entrants under the exceptional circumstances criterion.’

More recently the National Research Council’s Transportation Research Board (TRB) addressed the competitive ramifications of slot controls in its Special Report of August 2, 1999. The TRB Report stated that ‘increased opportunities for entry and competition in the domestic airline industry’ are an important public interest goal, but found that there were obstacles to achieving this goal ‘including long-standing rules that curb access to some of the country’s largest airports, among them New York’s JFK Airport. The TRB Report also noted that... ‘slot-controlled airports consistently are among the highest-priced markets in the country.’

[OST 99-5085-215, September 16, 1999]

The grant of a large number of slots has allowed JetBlue to bring low fare service to Upstate New York. By providing additional La Guardia slots to other new entrants, small communities, businesses and travelers will be specifically benefited.

Conclusion

The Department has put forth great effort to open foreign markets like Heathrow that are closed to new entry. While ACAA applauds and encourages the Department to continue to promote competition internationally, the Department must take action to “open skies” at domestic high density airports as well.

The FAA and the Department now have a unique opportunity to take steps to reverse the steadily decreasing level of competition. New entrants cannot wait another two, three, four or more years for competition to finally be addressed. The time is now.

ACAA urges the agency and the Department to seize this opportunity to address their statutory mandate to promote competition and new entry so that all can experience the benefits of deregulation.

Respectfully submitted,

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July 12, 2001

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Comments of the Air Carrier Association of America on July 12, 2001 by first-class mail to each of the persons named on the attached service list.

Nancy R. Thompson